Teisės aktualijos

THE EUROPEAN COURT OF HUMAN RIGHTS ON THE PRINCIPLE OF PROPORTIONALITY IN "RUSSIAN" CASES

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Proportionality is one of main principles scrutinizing actions adopted by national authorities which restricts rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms from November, 4th, 1950 (hereinafter – ECHR)[1]. When the arrest of a person would be disproportional to the gravity of committed crime? How one could balance the journalists' freedom of expression with the right to privacy of public person? Such and many other issues of conflicts between fundamental rights and rights of others or public interests has became routine technique in the case-law of European Court of human rights (hereinafter – ECtHR) including the huge number of applications brought to Strasbourg from Russia. The presentation starts out from general overview of proportionality principle. Analysis of both constitutional provisions and case-law of modern democracies support the argument that this principle has the status of international customary rule. It seems to be relevant in the light of unwritten character of proportionality in ECHR. Further it argues on fourth-elements structure of proportionality principle and considers its application in the cases bringing to the ECtHR versus Russia. This approach didn't mean that Russian cases are something special just the opposite. Those local examples demonstrate the general trend in ECtHR case-law on proportionality. Simultaneous there are some exceptions when ECtHR taking into account the transition character of Russian economic, political and legal system. Also the selection of case-law which illustrates the main points on proportionality is

[1] European Treaty Series, 1950, no. 5; United Nation Treaty Series, vol., 213, p. 221.

connected with importance of particular conventional rights to Russian applicants. Such selectivity of case-analysis is supported by official statistics of ECtHR[2]. This study has in some extent the critical approach. There are objections in academia against proportionality test such as the legitimacy of courts and judge-made law, as well as wide discretion and subjectivity of judges in this regard. Some of these critics will be explored in the connection with elements of proportionality.

1. General overview of proportionality

The starting point of proportionality principle analysis is the axiom that freedom of the human being can not be absolute. Therefore the fundamental rights guaranteed in the international legal instruments and national constitutions, objectively contradict with the necessity for protection of rights of others and public interests. Although the possibility of fundamental rights limitation very often leads to arbitrary measures taken by public authorities. So every democratic society attempts to set a proportion between individual rights and public aims.

In this connection the remarkable is the context in which the proportionality from wide philosophical conception became the legal status of principle in the field of rights protection. The majority of scholars agreed that the proportionality principle has the German roots[3]. In the modern doctrine of state law and practice of Federal Constitutional Court of Germany the principle of proportionality in a wide sense [*Verhaltnismaesigkeitsprinzip*] or ban of excessiveness [*Uebermaessverbot*] traditionally consists of three elements (sub-principles): 1) suitability [*Geeignetheit*], i.e. application of means which really reach desirable result; 2) necessities [*Erforderlichkeit*], assuming that used measures do is minimum possible harm to the rights unlike prospective application of alternative means; 3) proportionality in strict sense [*Zumutbarkeit, Angemessenheit, Proporlionalitat*] according to which restriction of fundamental rights should be in an optimum parity with protected public values. In one of the latest works devoted to a principle of proportionality, the professor of Humboldt University (Berlin) B. Schlink underlines that "from elements of legitimate aim, suitability and necessity of means it has extended to a proportionality element in strict sense which demands that the aim pursued by the state and burdening the citizen means stood in a proper correlation each other on value, a rank, weight, value, importance, quality or force"[4].

[2] Statistics for Russia on subject-matter of violation judgments show such a importance of convention rights: right to a fair trial (Art. 6) – 28%, 11% – right to liberty and security (Art. 5), 8% – inhuman or degrading treatment (Art. 3), 23% – protection of property (P1-1) and 30% – others. Country Statistic on 1 January 2009. URL: http://www.echr.coe.int/NR/rdonlyres/B21D260B-3559-4FB2-A629-881C66DC3B2F/0/CountryStatistics01012009.pdf (last visited 01.02.2011).

[3] ARNAULD, von A. Die normtheoretische Begruendung des Verhaeltnismaessigkeitsgrundsatzes. *Juristische Zeitung*. 2000, h. 6, s. 276–280; BLECKMANN, A. Begruendung und Anwendungsbereich des Verhaeltnismaessigkeitsprinzips. *Juristische Schulung*, 1994, h. 3, s. 177–183; ERICHSEN, H.-U. Das Uebermassverbot. *Jura*, 1988, s. 387–388; KREBS, W. Zur verfassungsrechtlichen Verortung und Anwendung des Uebermassverbotes. *Jura*, 2001, h. 4, s. 228–234; OSSENBUEHL, F. Masshalten mit dem Uebermassver-bot. *Wege und Verfahren des Verfassungslebens*: Festschrift fuer Peter Lerche zum 65. Geburtstag / hrsg. BADURA, P. von; SCHOLZ, R. Muenchen, 1993, s. 151–164.

[4] SCHLINK, B. Der Grundsatz der Verhaeltnismaessigkeit. *Festschrift 50 Jahre Bundesverfassungs-*

2. Proportionality as unwritten principle in ECHR and international custom as justification of its application by ECtHR

Besides the historical roots the important theoretical question concerning the proportionality is its form and place in the text of ECHR. As M.-A. Eissen observed in the one of the first separate research on proportionality and case-law of ECtHR it has "thinly veiled form"[5]. Although the unwritten principles are regularly applicable in common law in Russian context it's very hard to use such a rough notion as unwritten law both for academia and courts. For example when Supreme Court of Russian Federation starts to use *bona fides* in the cases concerning the abuse of workers rights[6] it follow to the resistance from Russian labour law publicist. Some of Russian scholars really think that "possibility of application by courts of the principle which is not containing in a positive law, would contradict with the essence of justice"[7]. Similar approach used in German Basic Law [Grund Gesetz]. It has also no textual ground of proportionality. And this test "in Germany is an unwritten constitutional rule derived from the principle of the rule of law"[8].

Such a unwritten character of proportionality principle is caused the necessity of more precisely argumentation for its application in the Russian legal system. As such justification can be seen the theory of international customary law. International custom defined "as evidence of general practice recognized by states as legally binding rules"[9]. So in the case-law of International Court of Justice (hereinafter – ICJ) the international custom divided into two main elements: 1) objective (general practice of state) and 2) subjective ("accepted as law" or *opinio juris*)[10]. ICJ holds in the Continental Shelf case (Libya v. Malta) that the substance of customary international law must be "looked for primarily in the actual practice and opinio juris of States"[11]. This theory has reason in the light of lack of tradition with application of unwritten legal principles in Russian national courts. Custom is the regular source for international law so it can be and must be used by international tribunals. As ECtHR holds that ECHR "should so far as possible be interpreted in harmony with other rules of international

gericht / BADURA, P.; DREIER, H. Bd. 2. Tubingen, 2001, s. 447.

[5] EISSEN, M.-A. The principle of proportionality in the Case-Law of the European Court of Human rights, *European system for the protection of Human rights* / ed. by MACDONALD, R. S. J., MATSCHER, F., PETZOLD, H. Dordrecht, Boston, London, 1993, p. 125.

[6] para. 27 of the Decision of Plenum of the Supreme Court of the Russian Federation from March, 17th, 2004 № 2 (as amended from December, 28th, 2006) "About application of the Labour Code of the Russian Federation by courts of the Russian Federation". *Bulletin of the Supreme Court of the Russian Federation*, 2004, nr. 6; 2007, nr. 3.

[7] KRUCHININ, A. V. The Forms of abusing right by labour contract parties (on judicial practice materials) [in Russian]. *Bulletin of the Udmurt university. Jurisprudence*, 2005. nr. 6, p. 140.

[8] SULLIVAN, T. E. Proportionality principles in American law: controlling excessive government actions / SULLIVAN, T. E.; FRASE, R. S. Oxford, 2009, p. 29.

[9] art. 38 of Statute of the Permanent Court of International Justice of League of Nation from1920, 16th of December. URL: http://www.worldcourts.com/pcij/eng/documents/1920.12.16_statute.htm (last visited 03.03.2011).

[10] Nicaragua v. US (Merits). *ICJ Reports*, 1986, p. 14, 97.

[11] *ICJ Reports*, 1985, p. 29.

law of which it forms part" (para. 35, 36)[12] it can be argued that comparative analysis demonstrates the existence of *general state practice*[13] on proportionality as objective element of international custom (the majority of countries have common approach of this concept). Together with *opinio juris* (as subjective element of international custom) this approach makes the application of proportionality principle by ECtHR more formal and legitimate in the light of its unwritten character in the text of ECHR. The use of state practice by judges and consent of public authorities with binding force of principle or rule concern will create the international customary law which obliging to obey the states' obligations.

3. Fourth-elements structure of proportionality and ECtHR case-law vs Russia

Bearing in the mind the above-mentioned state practice and case-law of ECtHR, it is possible to assume that the proportionality principle includes four elements: 1) legitimate aim, 2) suitability, 3) less restrictive mean and 4) balancing.

3.1. Legitimate aim and evidences in international litigation

The precondition of proportionality principle analysis or even its first element is the requirement of *legitimate aim* which national authorities must prove in order to restrict fundamental rights. It presupposes an assessment by ECtHR the importance of grounds for which rights restriction is established. Only really important and legitimate public aim provides the admissible rights restrictions. This requirement is contradicted with the restrictions caused by illegal interests or social prejudices.

ECHR directly defines this rule in art. 18: "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". In general such a purpose of restrictions are defined by the category "necessary in a democratic society" (art. 6 (1); art. 8 (2); art. 9 (2); art. 10 (2); art 11 (2); art. 1 of Protocol № 1; art. 2 (3) of Protocol № 4; art. 2 of Protocol № 7). This general category specified in many public interests and objectives mentioned in the text of ECHR: "national security" (art. 6 (2); art. 8 (2); art. 9 (2); art. 10 (2); art. 11 (3); art. 2 of Protocol № 4), "public order" (art. 6 (1), art. 8 (2), art. 9 (2), art. 10 (2), art. 11 (2), art. 2 (3) of Protocol № 4), "health" (art. 8 (2); art. 9 (2); art. 10 (2); art. 11(2); art. 2 (3)of Protocol № 4), "morals" (art. 6 (1); art. 8 (2); art. 9 (2); art. 10 (2), art. 11 (2), art. 2 (3)of Protocol № 4), "protection of the rights and freedoms

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[12] Fogarty v. the United Kingdom [GC], no. 37112/97, ECHR 2001-XI – (21.11.01)

[13] Most significant examples show the Law of **European Union** (art. 52 (1) of Charter of fundamental rights of the European Union from December, 7th, 2000; para. 96 of Judgment of the Court of 5 May 1998 C-180/96 «United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities» // European Court reports. 1998. P. I-02265), **Canada** (section 1 of Charter of the rights and freedom from April, 17th, 1982, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 http://canada.justice.gc.ca/loireg/charte/const_en.html; Regina v. Oakes, decided on February, 28. 1986 [Oaks Case] // Reports of the Supreme Court of Canada. 1986. Vol. 1. P. 103–143) and **South Africa** (s. 36 of Constitution of the Republic of South Africa, adopted on 8 May 1996 approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997. http://www.info.gov.za/documents/constitution/1996/index.htm; S v Makwanyane and Another: Constitutional Court, South Africa 1995 CCT 3/1994, 1995 (6) BCLR 665 (CC) http://www.constitutionalcourt.org.za/Archimages/2353.PDF)

of others" (art. 6 (1); art. 8 (2); art. 9 (2); art. 10 (2); art. 11 (2), art. 2 (3) of Protocol № 4), "economic well-being of the country" (art. 8 (2)); "territorial integrity" (art. 10 (2)); "interests of justice" (art. 6 (1); art. 10 (2)) etc.

Despite the various formulations, all these concepts could be deduced to the protection or the rights of other persons or public interests. The given two categories also act as the general basis of restriction of convention rights. There are no doubts that all mentioned concepts are abstract enough and therefore allow the national authorities to justify absolute majority of rights restrictions. Although ECtHR of importance and legitimacy of the purposes which prove such restrictions.

Case-Law of ECtHR shows that national authorities not always have sufficient grounds for restriction of rights. In particular, in the case of "Burdov v. Russia" (Judgment from May, 7th, 2002) ECtHR holds that delays in the execution of the judgments constituted an interference with property rights of applicant (art. 1 of Protocol № 1). This conclusion caused by the assessment of ECtHR that "Government have not advanced any justification for this interference and the Court considers that a lack of funds cannot justify such an omission"[14]. In this case lack of budget resources, according to the ECtHR, is not the legitimate purpose which could prove such a restriction of right.

The similar reasons ECtHR used in case "Kormacheva v. Russia" (Judgment from January, 29th, 2004). For justification of restriction of the right to a fair trail (art. 6) Government cited mainly objective difficulties faced by Russian courts in the case of the applicant, such as the lack of staff, poor technical condition of its building and geographical remoteness. ECtHR has disagreed with Government arguments and has considered "that these difficulties do not excuse the State from ensuring that the proceedings were dealt with within a reasonable time"[15].

In the Judgment from May, 19th, 2004 "Gusinsky v. Russia" ECtHR finds as unreasonable the restriction of the right to liberty and security (art. 5) for the purpose of acquisition by the Government of applicant's private company. As ECtHR stated "it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies … applicant's prosecution was used to intimidate him"[16].

3.2. Suitability and the problem of Judicial Legitimacy

This element presupposes testing of potential possibility if the chosen by national governments restrictive means achieve desirable aim. Relationship between mean and aim should be rational and not lead to absurd results or unreasonableness (rationality test). Unreasonableness is well-known doctrine which applied, for example, by English courts (Wednesbury test)[17].

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[14] *Burdov v. Russia*, no. 59498/00, § 41, ECHR 2002-III

[15] *Kormacheva v. Russia*, no. 53084/99, § 55, 29 January 2004

[16] *Gusinskiy v. Russia*, no. 70276/01, § 76, ECHR 2004-IV

[17] Associated Provincial Picture Houses Ltd v. Wednesbury Corporation: Judgment of Royal Courts of Justice from 10 November 1947 // England and Wales Court of Appeal (Civil Division) Decisions. 1947. 1. URL: http://www.bailii.org/ew/cases/EWCA/Civ/1947/1.html (last visited 01.02.2011) or [1947] 2 All ER 680

Lord Greene explains the concept of "unreasonable" in relation to exercise of statutory discretions "as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority".

The suitability requirement has expressed implicitly in the text of the ECHR. The provisions of art. 5 (3) presupposed arrest or detention as suitable restriction of the right to liberty and security only within the reasonable terms of proceeding. Lack of reasonable connection between the purpose (prevention of crime) and mean (liberty's restriction) leads to violation of suitability requirement. ECtHR has used such interpretation of suitability in the case "Kalashnikov vs. Russia" (Judgment from July, 15th 2002). In spite of legitimate aims to restriction of the right to liberty and security ECtHR holds it as unsuitable. According to the opinion of ECtHR, applicant's offences "could initially suffice to warrant the applicant's detention. However, as the proceedings progressed and the collection of the evidence became complete that ground inevitably became less relevant"[18]. Hence, during the certain period the restriction of right in question became unsuitable.

Using considered criterion, ECtHR has formulated similar positions in the case "Smirnova v. Russia" (Judgment from July, 24th 2003) recognizing unsuitable the withholding of passport as restriction of the right to private life (art. 8) in connection fraud proceedings of twin sisters. ECtHR has analyzed in detail the possibility of achievement by the given mean the purposes specified in art. 8 (2). ECtHR ruled that "the withholding of the passport did not serve the interests of national security because the charges of fraud were not amongst crimes undermining fundamental principles of Constitutional system or State security. National security would not have suffered, had the applicant been able to find a job, go to a clinic, marry etc. Nor was the applicant's offence a threat to public safety. And, in any event, without a passport Y.S. would have been able to threaten public safety had she so wished, as well as if she had the document. The withholding of the passport could not improve the economic well-being of the country, lead to public disorder or crime. It did not serve the interests of protecting health or morals or the rights and freedoms of others. It was not necessary in a democratic society either"[19]. ECtHR has come actually to the conclusion about absurd of rights restriction. «The only reason the authorities gave for keeping the passport in the case file was their own convenience of telling Elena Smirnova (one of twin sister. – *A.D.*) from her twin sister. This reason was not only beyond the law but also beyond common sense as it is not clear how attaching the passport to the case file could make her identification easier" (para. 93).

[18] *Kalashnikov v. Russia*, no. 47095/99, § 117, ECHR 2002-VI.

[19] *Smirnova v. Russia*, № 46133/99 and 48183/99, § 92, ECHR 2003-IX.

At the same time suitability requirement presupposes the self-restraint of ECtHR in order to guarantee the *Judicial Legitimacy*. The above-mentioned Wendsbury test is well-known example of judicial self-restraint likewise. The Court in this judgment not only has rejected the applicant's argument on unreasonableness of provisions that no child under the age of sixteen should be admitted to this cinematograph theatre on Sunday, but also remind that "proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views […] The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere".

Such logic should be applied to the case-law of ECtHR and connected with the Margin of Appreciation and Subsidiarity doctrines. These doctrines actually bring up the problem of legitimacy of ECtHR itself. In the Judgment of December, 18th 1986 ECtHR gives its own solution to the problem: "Although it is not normally the Court's task to review the observance of domestic law by the national authorities, it is otherwise in relation to matters where, as here, the Convention refers directly back to that law; for, in such matters, disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise a certain power of review. However, the logic of the system of safeguard established by the Convention sets limits on the scope of this review. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection"(para. 58)[20]. So the national law-making bodies should in the first place predict the possibility of achievement by means (restriction of rights) the protected purpose (public interests or values). In international litigation the hypothesis about a reality of such achievement should be initially justified by national governments, but can be assessed by ECtHR. If mean have been defined by ECtHR as unsuitable or unreasonable the further scrutiny of proportionality can not be required. On the contrary, even means which is suitable could contradict with further elements of proportionality principle.

3.3. Less restrictive mean and judicial law-making

Less restrictive mean (hereinafter – LRM) as an element of proportionality assumes

[20] *Bozano v. France* – Series A no. 111, p. 25, para. 58 (18.12.86). See also among other this principle in case of Sherstobitov v. Russia (Application no. 16266/03) The Court reiterates that … "in the first place, it is for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where […] failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed". – *Sherstobitov v. Russia*, no. 16266/03 (Sect. 1) – (10.6.10), para. 110.

presence and a choice of alternative means which are less restrictive or minimal for rights-holders if government has no additional costs (organizational, financial). LRM requirement could be defined as *minimality*. Harm which is caused to the rights-holders should be less, than the advantage received from limitation of their possible abuse of convention rights. The aim should really needs the chosen mean that why this sub-principle of proportionality is known also as *necessity test*.

Example of explicit provisions of ECHR defining LRM requirement is lit. "b", art. 4 (3) according to which work in case of conscientious objectors is mildest means limiting labour freedom as compared to compulsory military service.

The LRM requirement is widely applied by ECtHR scrutinizing the legal responsibility and selecting its mildest alternative measures. In the case "Kalashnikov vs. Russian" (para. 95) ECtHR has noticed that in the case of imprisonment "ill-treatment must attain a minimum level of severity … the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured". Factually in this case ECtHR predict to the States to minimize a consequence of such rights restrictions as imprisonment or shows to them on necessity of alternative, less restrictive measures. In particular ECtHR has defined such mildest means. ECtHR makes the reference to the case-law of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment which has set 7 sq. m per prisoner as "an approximate, desirable guideline for a detention cell" (para. 97). At the same time during the different periods of applicant's detention this area was much less (from 0,9 to 1,9 sq.).

Also the conclusion about lack of LRM contains in the case Ilaşcu and Others v. Moldova and Russia (Judgment from July, 8th, 2004) in which as unreasonable restriction of prohibition of torture (art. 3) detention of the applicant in inhuman conditions was recognized. As ECtHR has stressed "measures depriving a person of his liberty are usually accompanied by such suffering and humiliation. Article 3 requires the State to ensure that every prisoner is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured"[21]. Hence, presence of LRM does not allow the national authorities to use such limitations of fundamental rights.

In this regard the LRM requirement connected with the question of involvement of judicial bodies in to *law-making process* and their possible interference into competence of national political actors. Definition by ECtHR of alternative LRM actually lead not only to negative but also to positive judicial law-making.

[21] *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 428, ECHR 2004-VII

3.4. Balancing and subjectivity of judges

This element (proportionality in strict sense) is directed on achievement of optimum balance of individual and public values. Conflicting right and public interest should be weighed on their importance in a scale of values set up in ECHR. In contrast to previous elements of proportionality, which were connected with "means (restriction of right) – aims (public interests) relation", balancing involves two competing values, on one hand, certain fundamental right and on another – public interest. In this respect the last element of proportionality is one of main judicial technique in the decision-making process. As ECtHR in the early case-law (Sporrong and Lonnroth v. Sweden) have been determined that search for the balance of "the general interest of the community and the requirements of the protection of the individual's fundamental rights … is inherent in the whole of the Convention"[22]. Although not all judges was agreed with such a conclusion predicting the possible clash of ECtHR with national political actors. As judge Terje Wold pointed much more earlier in his partly dissenting opinion that "even worse is the interpretation by the majority that the Convention 'implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights'. I strongly disagree with this interpretation. In my opinion it carries the Court into the very middle of the internal political questions of each Member State, which it has never been the intention that the Court should deal with"[23].

In "Russian cases" the fair balance notion is also clearly expressed. As balancing the public interests and rights to liberty in the case "Smirnova vs. Russia", ECtHR has noticed that «continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty» (art. 61). The category mentioned by ECtHR "weighing" includes the obligation of national Parliament to select such means of rights restriction which would allow the possible enjoinment of each values in question.

The process of balancing is presupposed the subjectivity of judges which always in adjudication assessing the arguments of litigating parties. It's the nature of litigation itself and the courts as arbiters in cases. Comparing the national judges which firstly examined the case the international judges as in ECtHR can be more objective or could help to transform the values common to particular nation and country. In this regard the national courts may be bounded by political, social condition and even prejudices significantly than international tribunals. An example of tension between common to all members of Councils of Europe values on one hand and cultural prejudices exciting in Russia on the other demonstrates the case of Case of Konstantin Markin v. Russia[24]. Examining this case Constitutional

[22] *Sporrong and Lonnroth v. Sweden*, 23 September 1982, § 69, Series A no. 52

[23] Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), 23 July 1968, § 101, Series A no. 6

[24] Case of Konstantin Markin v. Russia (Application no. 30078/06) Judgment from 7 October 2010

Court rejected the serviceman application on challenging the statutory prohibition from combining the performance of his military duties with parental leave taking more weight to special legal status of the military and duty to defend the Fatherland[25]. As an opposite ECtHR considers that "the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention … it cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue" (para. 47). And as a result ECtHR concluded that "the Constitutional Court based its decision on a pure assumption, without attempting to probe its validity by checking it against statistical data or by weighing the conflicting interests … the difference was founded on the traditional gender roles, that is on the perception of women as primary child-carers and men as primary breadwinners, these gender prejudices cannot, by themselves, be considered by the Court to amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation" (para. 49). However the subjectivity of judges still remained the critical issue in the regard of balancing the competing conventional rights and public values.

[25] Russian Constitutional Court 187-O-O Decision of Jan. 15, 2009

Conclusions

Due Margin of Appreciation doctrine and jurisdictions of ECtHR national authorities possesses certain discretion upon setting the proportionality of conventional rights restriction. Simultaneously, being the one of main principle of conventional rights protection, the proportionality predetermines possibility of the international judicial review of national restrictive measures. Legitimate aim as precondition of this principle considered. In the definition of reasonability requirement (legitimate aim) the arguments of the Government which justify restrictions of the convention rights, and also assessment by ECtHR of victims' counterarguments are important. Observance of a principle of proportionality in a wide sense demands three consecutive stages. 1) Suitability means check of main possibility of achievement by means of the desirable aim. Means and the purpose should be in reasonable relation. 2) Minimality assumes presence and a choice of alternative means which are less restrictive for conventional rights. The aim should demand really means. 3) Balancing (proportionality in strict sense) is directed on weighing of clashing individual and public values. The given criterion will be broken, if outcomes of conventional rights restrictions outweighs advantage reached from prevention its abuse.

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